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REPORT ON RECENT ETS  
AND IAQ DEVELOPMENTS

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May 28, 1993

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### IN THE UNITED STATES REGULATORY AND LEGISLATIVE MATTERS

103D CONGRESS

*FDA*

[1] **Representatives Synar and Durbin Introduce  
Fairness in Tobacco and Nicotine Regulation  
Act of 1993**

All aspects of cigarette manufacturing and marketing would be regulated by the U.S. Food and Drug Administration (FDA) under the provisions of the Fairness in Tobacco and Nicotine Regulation Act of 1993 (H.R. 2147), introduced on May 18, 1993, by two Democratic Representatives, Mike Synar of Oklahoma and Richard Durbin of Illinois.

The text of the Act includes "findings" that "environmental tobacco smoke is a cause of disease in nonsmokers"; that the "labeling of tobacco products is inadequate to provide smokers and nonsmokers alike with full and complete information about tobacco products"; and that "there is no listing of chemical constituents found in mainstream and sidestream smoke (including benzene, arsenic, cyanide, etc.)." In addition to complying with the requirements of the current Cigarette Labeling and Advertising Act, cigarette packaging would have to include "a warning and information about the dangers associated with environmental tobacco smoke" as well as "a list of chemical additives and constituents found in tobacco products and tobacco smoke."

The Act would also, among other things: (i) require the FDA to promulgate a regulation requiring that all additives used in the manufacture of tobacco products be "safe"; (ii) require tobacco product manufacturers to pay the costs of their own regulation under the new chapter, at whatever level Congress specifies; (iii) replace the statutory carbon monoxide warning for cigarettes with an addiction warning; and (iv) repeal the preemption provision of the Federal Cigarette Label and Advertising Act, 15 U.S.C. § 1334(b).

At about the time the bill was introduced, the Coalition on Smoking or Health released a poll which purportedly found that 68 percent of Americans believe the FDA should regulate tobacco and that 75 percent feel that warnings about the ETS exposure should be added to cigarette packages.

As of this writing, a companion bill had not been introduced in the Senate.

[2] **Senate Subcommittee Holds IAQ Bill Hearings**

The Nuclear Regulation Subcommittee of the Senate Environment and Public Works Committee held hearings on May 21 and May 25 to consider the Indoor Air Quality Act of 1993 (S. 656) and the Indoor Radon Abatement Act of 1993 (S. 657). EPA Deputy Administrator Robert Sussman and Representative Joe Kennedy (D-Mass.) testified. *See The Reuter Washington Report*, May 21, 1993; *BNA Daily Report for Executives*, May 24, 1993.

Kennedy, who has introduced his own Indoor Air Quality Act in the House (H.R. 1930), says he has met with EPA Administrator Carol Browner and White House officials, whom he says agree that indoor air quality is a priority issue. The House measure must pass through three committees, and, without support from the Bush Administration, the bill stalled in committee in past years. Kennedy reportedly believes that the committee logjam will be broken this year. *See States News Service*, May 19, 1993.

[3] **House Smoking Accommodation Policy May  
Affect Legislation**

The smoking policies recently addressed in House office buildings and on the House side of the Capitol may have satisfied those Congressmen who had been calling for complete bans.

Representative Jim Traficant (D-Ohio), who introduced legislation to ban smoking in all federal buildings (H.R. 881), apparently met recently with Speaker of the House Thomas Foley (D-Wash.) to discuss the new smoking

policy and his bill. According to a press report, Traficant expects the bill to be marked up soon and anticipates that it will be amended during mark-up to permit designation smoking areas in federal buildings.

In a related development, the ranking member of the Rules and Administration Committee in the Senate, Ted Stevens (R-Alaska), told the press that he does not anticipate that any measures will be taken in the Senate to establish any official smoking or nonsmoking policy. *See Roll Call*, May 13, 1993.

## U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

- [4] *ASH v. Department of Labor*, No. 92-1661 (U.S. Court of Appeals, D.C. Circuit)  
(filed December 22, 1992)

On May 20, 1993, the Court of Appeals issued an order denying the Department of Labor's motion to dismiss this action. In the suit, ASH seeks to overturn what it had characterized as a denial by OSHA of its request to commence a separate rulemaking on ETS.

In denying the motion, the court specifically found that the October 30, 1992, letter from OSHA responding to ASH's request for rulemaking "meets the criteria of a final, reviewable order." In that letter, then-Acting OSHA Director Dorothy Strunk stated that nothing would be gained by separating the issue of ETS from other indoor air quality issues. *See* issue 34 of this Report, November 6, 1992.

The court has also granted ASH's request to hold the case in abeyance for 60 days and directed the parties to file motions to govern further proceedings "within 60 days of the date of this order." ASH had filed the abeyance request in light of then-Secretary of Labor Lynn Martin's directive to the agency to prepare a report for the incoming Secretary outlining separate rulemaking options for ETS. *See* issues 39, 41, 42, and 44 of this Report, January 22, February 19, March 5, and April 2, 1993.

- [5] **Kennedy Says OSHA Reform Measures Have  
Good Chance of Passage**

Prospects for passage of the Occupational Safety and Health Reform Act (H.R. 1280, S. 575) in this Congress are "very, very good," according to Massa-

chusetts Senator Edward Kennedy. The only roadblock to passage, according to Kennedy, is scheduling, because the "first order of business" in the Senate will be the economic and national health care programs.

Kennedy acknowledged the failure of Labor Secretary Robert Reich to endorse the bill in House testimony on April 28, but said he expects that the Clinton administration will strongly back the measure. He is also quoted as saying that the bill is "a high priority with the administration." *See BNA Washington Insider*, May 12, 1993.

## CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC)

- [6] **CDC Schedules Meeting to Discuss ETS  
Exposure in the Workplace**

ETS exposure in the workplace will be the focus of a meeting of the CDC's Interagency Committee on Smoking and Health, scheduled for June 23, 1993, in Washington, D.C. The meeting will be open to the public. *See* 58 *Fed. Reg.* 29227 (May 19, 1993).

In January 1993, simultaneously with the release of the EPA Risk Assessment on ETS, the CDC launched a multimedia public information program relating to the alleged health effects of ETS. The CDC is within the Department of Health and Human Services (HHS). HHS then-secretary Louis Sullivan announced the program in a joint press conference with then-EPA Administrator William Reilly. Sullivan said HHS had adopted certain "goals regarding secondhand smoke to be achieved by the year 2000." According to Sullivan, those goals include the following: reducing by half the percentage of children living in a home with one or more smokers; establishing tobacco-free environments in all public schools; and passing legislation in all states that "prohibit or strictly limit smoking in the workplace and in enclosed public places." *See* issue 38 of this Report, January 7, 1993.

## ASHRAE

- [7] **ASHRAE Committee Chair Says No Surprises  
in Draft Ventilation Standard**

Revisions that are being considered for ASHRAE 62-1989 will reportedly not be startling or revolutionary.

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The biggest changes could include a discussion of residential ventilation, a section on HVAC operation and maintenance, and greater emphasis on a procedure to make adjustments to pollutant concentrations with variable ventilation rates. This according to W. Gene Tucker, chair of the ASHRAE committee that is reviewing the ASHRAE Standard 62-1989, *Ventilation for Acceptable Indoor Air Quality*.

Tucker told the press that the committee hopes to have the first draft of the standard ready for ASHRAE's annual meeting this June in Denver, Colorado. The committee is apparently planning to have a version ready for public comment by 1995. See *Indoor Air Quality Update*, May 1993.

## STATE AND LOCAL GOVERNMENTS

### [8] Some State OSHA Plans Roll Back Worker Exposure Limits

A number of states that have state OSHA plans have reportedly decided to roll exposure limits back to the levels set by OSHA in 1971. This, reportedly, in the wake of a decision by the U.S. Court of Appeals for the Eleventh Circuit to invalidate federal OSHA exposure limits for some 400 hazardous substances (*AFL-CIO v. OSHA*, see issue 35 of this Report, November 20, 1992). Other states that are required to keep pace with federal OSHA standards will, nonetheless, continue to enforce the limits that have been overturned by the court.

According to a press report, among those states which will enforce the more stringent standards are California and Connecticut (only with respect to public employees). In Oregon, regulators will reportedly temporarily revert to the 1971 standards until they can determine which of the more stringent exposure limits adopted by the state predated the 1989 federal OSHA rulemaking. See *BNA Daily Labor Report*, May 12, 1993.

### [9] Florida Considers Rules to Implement Clean Indoor Air Act

The Florida Department of Health and Rehabilitative Services conducted rule development workshops in April and May to consider draft rules that would implement the provisions of the state's smoking restrictions statute, the Clean Indoor Air Act. Commentary on the draft rules was solicited by the depart-

ment from interested parties. The draft rules (i) specify what acts constitute violations of the statute; (ii) adopt procedures to be followed by government personnel in responding to complaints about smoking or inspecting workplaces and public places for violations of the statute; and (iii) impose certain fines for first, second and third violations.

The statute, which has been in effect since 1988, restricts smoking to designated areas in public places, prohibits smoking in places such as elevators, school buses, waiting rooms, and day care centers, and requires that employers adopt smoking policies designating smoking and nonsmoking areas that accommodate the interests of smokers and nonsmokers. Common areas in workplaces, however, may not be designated as smoking areas. Fines for violations of the statute cannot exceed \$100 for a first offense and \$500 for subsequent offenses.

### [10] ETS-Related State and Local Legislative Activities

#### • California

According to a news report, a bill was defeated in California that would have allowed lawsuits against tobacco manufacturers by people claiming they had been harmed by exposure to ETS. Backers of the bill had relied in part on the EPA Risk Assessment on ETS. In the past, similar bills had failed in the Assembly Judiciary Committee because of a 1987 agreement among insurers, trial lawyers and doctors to refrain from passing any type of tort reform legislation. Now that the agreement has expired, the bill's backers had hoped that the legislation would be approved. See *The Recorder*, May 11 and May 13, 1993.

On May 13, 1993, the Assembly passed two measures that would prohibit smoking in state buildings, including the Capitol. The first bill affects buildings owned or leased by the state, including prisons, courts, and University of California and California State University classrooms. Governor Wilson had previously issued an executive order prohibiting smoking in buildings under his administration's jurisdiction, but the order had not included universities, the judiciary or the legislature.

The second measure passed prohibits smoking in buildings owned, leased or occupied by the legislature, including the Capitol, floors of both houses, commit-



tee hearing rooms, offices, hallways, stairwells, restaurants and bathrooms. The bill's sponsor reportedly said the EPA Risk Assessment made it clear that the Capitol should be smoke-free. "If there were ever an argument that smokers are doing it to themselves and no one else is affected, this report and the seven years of reports that have preceded it put that issue to rest," he was quoted to say. See A.B. 291 and A.C.R. 27, Regular Session (1993-94) and *Sacramento Bee*, May 11, 1993, *United Press International*, May 13, 1993, *The San Francisco Chronicle*, May 14, 1993, *Los Angeles Times*, May 15, 1993.

#### • Local Governments in California

The City Council of San Carlos passed an ordinance on May 10 that will prohibit smoking in restaurants, private workplaces and public transit waiting areas with shelters. The ordinance goes into effect June 10. Exemptions were provided for bars, private residences, bowling alleys, pool halls and conference or meeting rooms in hotels. Workplaces where all employees smoke and agree to allow smoking in the building also were exempted. Outdoor restaurants will be required to reserve half their seating for nonsmokers. Smoking will be allowed in restaurants having separate, enclosed smoking rooms with separate ventilation systems. See *The San Francisco Chronicle*, April 28 and May 12, 1993.

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## ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

### [11] *Blanchard*: Hearing on Defendants' Venue Motions Continued

The hearing on defendants' motions to transfer venue and motions to strike, scheduled for May 20, 1993, has been continued to July 1, 1993. Most defendants have now filed responses to plaintiffs' interrogatories and document requests.

Three of the 14 plaintiffs in this case presently allege injury from exposure to ETS. Raye Blanchard and Tamara Reed, mother and daughter, both claim damages for unspecified "illness and disease" allegedly resulting from exposure to the ETS from cigarettes smoked by Raye's deceased husband, Thomas, and by Raye herself, who claims she smoked "for about ten years." The third ETS plaintiff, Pamela Kastrin

Stephens, claims unspecified "lung and respiratory diseases" allegedly caused by exposure to the ETS from the cigarettes smoked by her deceased father. The named defendants are purported to be the six major U.S. cigarette manufacturers, The Tobacco Institute, the Council for Tobacco Research, and a number of wholesalers and retailers. *Blanchard, et al., v. R.J. Reynolds Tobacco Company, et al.* (District Court, Galveston County, Texas) (filed July 31, 1992).

### [12] *Broin*: Plaintiffs' Request for a Stay Denied

At a hearing on May 17, 1993, Judge Robert Kaye denied plaintiffs' motion for a stay of the case before the trial court while the two appeals in the case are being resolved. Plaintiffs filed the motion for a stay on May 14. Plaintiffs have appealed the trial court's order dismissing the class action allegations in their complaint, while seven defendants have filed a petition for writ of certiorari to review the trial court's order denying their motions to quash deposition notices served on senior executives of six of the defendants.

At the same hearing, Judge Kaye granted in part the motions to dismiss filed by The Tobacco Institute and the Florida Tobacco and Candy Association. The court dismissed the strict liability, negligence and breach of implied warranty claims against both defendants in plaintiffs' amended complaint but denied the motions to dismiss as to the fraud and conspiracy counts. Judge Kaye also denied the motions to dismiss the fraud and conspiracy counts in plaintiffs' amended complaint that were filed by the Council for Tobacco Research and the Tobacco Merchants Association.

Also on May 17, 1993, Judge Kaye issued an order that dismissed the claims filed by plaintiffs Bonita Baker and Terry Casto. Baker's claims were dismissed due to Lorillard's renewed motion for sanctions, while Casto sought a voluntarily dismissal of her claims.

Plaintiffs have filed motions for protective order regarding the depositions of plaintiffs Gary Hayes and Valerie Gibson, scheduled for June 2 and June 16. They are the first plaintiffs scheduled for depositions.

At issue in this case are the claims of 28 flight attendants allegedly injured by occupational exposure to ETS. In addition, the husband of one of the flight attendants claims loss of consortium. The attendants purport to represent a class of approximately 60,000.

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Injuries alleged by the putative class representatives include lung cancer, breast cancer and unspecified respiratory ailments. Plaintiffs further allege that occupational exposure to ETS on board aircraft causes at least 22 diseases and a reasonable fear of contracting such diseases. The defendants are purported to be the six major U.S. cigarette manufacturers (plus related entities), UST, Inc., United States Tobacco Company, Dosal Tobacco Corp., the Council for Tobacco Research, The Tobacco Institute, and three trade associations. *Broin, et al., v. Philip Morris, et al.* (Circuit Court, Dade County, Florida) (filed October 31, 1991).

[13] *Butler. Discovery*

The deposition of plaintiff Dean Butler, the wife of plaintiff Burl Butler, was taken as scheduled on May 19 and 20, 1993. Mrs. Butler alleges loss of consortium as a result of Mr. Butler's lung cancer. Mr. Butler claims his lung cancer was caused by exposure to ETS in the barbershop he owned and operated for approximately 30 years.

As of this writing, a status hearing was still scheduled for May 28 on plaintiffs' various motions, including their motion for a discovery conference, their motion for leave to file a second amended complaint, and several motions relating to discovery matters. It is possible that a trial date will be set at this hearing.

The defendants in this case consist of the six major U.S. cigarette manufacturers and several local retailers. *Butler v. R.J. Reynolds Tobacco Company, et al.* (Circuit Court, Hinds County, Mississippi) (filed October 21, 1992).

[14] *McKinney. Motions to Dismiss Filed*

Brown & Williamson and R.J. Reynolds recently filed separate motions to dismiss the complaint with prejudice based on the court's lack of subject matter jurisdiction over the allegations against them.

Plaintiff William McKinney, who is a prisoner in a Nevada jail, contends that defendants failed to warn of the alleged health effects of ETS exposure. He claims emotional pain, severe headaches, itchy and watery eyes, and recurring chest pains as a result of his exposure to ETS. *McKinney v. C.M. Products, Inc., et al.* (District Court, White Pine County, Nevada) (filed March 3, 1993).

Mr. McKinney is also the plaintiff in a civil rights case against Nevada prison officials regarding his exposure to ETS while incarcerated. The U.S. Supreme Court heard argument in the case earlier this year; a decision is expected within the next month.

ETS/IAQ LITIGATION NOT INVOLVING  
CIGARETTE MANUFACTURERS

AMERICAN WITH DISABILITIES ACT (ADA)

[15] *Staron v. Wendy's Old Fashioned Hamburgers of New York, Inc., No. 3:93CV-666* (U.S. District Court, Connecticut) (filed March 30, 1993)

On May 11, 1993, Wendy's filed its answer to the discrimination complaint filed under the ADA by two children who allegedly suffer from asthma and a woman who allegedly suffers from lupus to force the defendant to adopt a smoking ban as an accommodation of their "disabilities." The defendant specifically denies that it owns or operates a Wendy's Restaurant at any location in Hartford County, but asserts that of its restaurants in Connecticut, all are in compliance with applicable federal, state and local laws with respect to smoking.

Other defenses asserted include (i) failure to state a claim upon which relief can be granted; (ii) lack of standing; (iii) the absence of any requirement under the ADA for restaurants to ban smoking; and (iv) "[t]he issues raised by plaintiff in the Complaint are essentially political in nature, and therefore are matters for legislative rather than judicial resolution."

As of this writing, the defendants in the related ADA cases of *Staron v. McDonald's Corp.* and *Staron v. Burger King Corp.* had not yet filed their responses.

IAQ: CARPET EMISSIONS

[16] *Howell v. Shaw Industries, Inc., 93-CV-2068* (U.S. District Court, Eastern District, Pennsylvania) (filed April 19, 1993)

Three of four defendants in this class action involving damages allegedly caused by toxic emissions from carpeting have, by stipulation, extended the time to file their answers until June 2, 1993.

As of May 18, nothing had been filed in the docket on behalf of defendant Shaw Industries, Inc. to extend the time for responding to the complaint, nor had Shaw yet filed its answer. For a discussion of the plaintiffs' allegations, see issue 46 of this Report, April 30, 1993.

### WORKPLACE: HARASSMENT

[17] *Stotko v. Dakota County* (Dakota County, Minnesota) (decided May 7, 1993)

A jury has reportedly awarded \$117,000 in damages and \$33,000 in lost wages to a county employee who claimed she had been harassed after complaining that co-workers were ignoring a smoking ban.

Mary Stotko, a county dispatcher, evidently told her supervisors on January 6, 1991, that employees were continuing to smoke in spite of a building-wide ban that had gone into effect on January 1. According to her attorney, Stotko's co-workers then ceased passing essential information to her, left her alone in the office during busy times, and would not speak to her when she greeted them. Stotko eventually quit working as a dispatcher.

According to a press report, this case is the first to be decided by a jury for harassment over enforcement of the State Clean Indoor Air Act. In a related development, legislative employees have apparently been told to stop harassing an employee who complained that the no-smoking law is not being enforced in the Capitol. See *Star Tribune*, May 9, 1993.

### PRISONER CASE

[18] *Stanfield v. Hay*, 1992 Ky. App. LEXIS 228 (Supreme Court, Kentucky) (discretionary review denied April 14, 1993)

The Supreme Court of Kentucky has denied an application for discretionary review filed by a county jail inmate who alleged that his constitutional and civil rights were being violated by a prison smoking ban. In so ruling, the Supreme Court upheld a Court of Appeals decision which found no violations of petitioner David Stanfield's rights. See issue 36 of this Report, December 4, 1993.

### LEGAL ISSUES AND DEVELOPMENTS

[19] *Television Broadcast Addresses Child Custody Cases and Smoking*

During a May 18, 1993, broadcast of *NBC Nightly News*, the issue of children being removed from the custody of smoking parents in divorce actions was addressed. The report featured the cases of Timothy Badao and K.C. Mitchell. Badao's visitation rights with his son were reportedly cut to four days a month by a judge who agreed with the boy's mother that smoking was aggravating the boy's asthmatic condition. Mitchell evidently lost custody of her son solely because she smoked. During the report, a pediatrician was quoted as saying "it's well-known that it doubles the incidence of SIDS, which is Sudden Infant Death Syndrome, if one of the parents smokes." See *NBC Nightly News*, May 18, 1993.

[20] *ASH Creates Form Letter for ADA Complaints to Restaurants*

In its most recent publication, ASH has included a form letter for those who are "so sensitive to tobacco smoke that exposure in a public place causes them difficulties with breathing or eating." The letter, according to ASH, will make it possible at a later time to file "a more formal complaint" with the Department of Justice under the Americans with Disabilities Act (ADA) against proprietors of public places such as restaurants who refuse to impose smoking bans.

The form letter warns its recipient that "persons sensitive to tobacco smoke are entitled to protection under disability laws. Please understand that if you do nothing to remedy the problem, I may be forced to take legal action." The letter further discusses the litigation pending against fast-food restaurants in U.S. District Court in Connecticut, and advises the recipient to contact ASH for "further information concerning your possible legal liabilities for refusing to curtail smoking." See *ASH Smoking and Health Review*, March-April 1993.

[21] *New Jersey Magazine for Trial Lawyers Issues 'Call to Arms' for ETS Litigation*

Claiming "the tobacco lobby is no better than a common criminal," the May 1993 issue of *New Jersey*

*Trial Lawyer* exhorts its readers to initiate ETS litigation against cigarette manufacturers and other defendants. "Trial lawyer associations and every public interest law firm should use their contacts around the country to find plaintiffs who are harmed by second-hand smoke and get their claims before the judiciary," the magazine asserts in an editorial. The editorial relies heavily on the EPA Risk Assessment on ETS and claims that ETS exposure "causes 30 times as many lung cancer deaths as all other cancer causing air pollutants regulated by the EPA."

Including the editorial, the issue contains three articles related to tobacco litigation. In the second article, which deals with parental smoking, the author advances this hypothetical situation: A nonsmoking, divorced mother, who has custody of her five-year old daughter, files a motion with the New Jersey Family Court to enjoin the child's father from smoking in his daughter's presence. According to the hypothetical, "[t]he child is in good health, but returns home to her mother every Sunday night [after weekend visitation with the father] with her clothes smelling slightly from cigarette smoke."

The author says such a case is unprecedented in reported New Jersey decisions but that he feels the injunction may properly be granted. "[A]ny constitutional right a parent has with regard to his or her children is subject to the best interest of the children," he asserts. "Any inconvenience caused by a court-ordered smoking ban is, by any reasonable stretch of the imagination, more than outweighed by the benefits which accrue to a child through clean air in a smoke-free environment."

To support his claim that ETS exposure increases a child's risk of illness, the author cites a 1991 report from the Department of Health and Human Services, a 1992 statement from the American Cancer Society and the EPA risk assessment.

The third article focuses not on ETS issues, but on preemption and the *Cipollone* decision by the U.S. Supreme Court. "[T]he court has finally removed the preemption shield that has given cigarette manufacturers unparalleled success in defending against claims based on state law," the author contends.

The *New Jersey Trial Lawyer* is the second legal publication in as many months to attempt to foster

ETS litigation. The April 1993 issue of the *Indoor Pollution Law Report* was devoted primarily to ETS litigation. See issue 47 of this Report, May 14, 1993.

#### [22] Smoker Is Assaulted in Restaurant

A woman sitting in the smoking section of a Maryland restaurant was reportedly struck several times by a man when she refused to put out her cigarette at his request. The alleged assailant, a 47-year-old attorney, has been charged with criminal assault, with a trial date set for June 9, 1993. See *Baltimore Sun*, May 21, 1993.

#### [23] "Resurrecting an Old Cause of Action for a New Wrong: Battery as a Toxic Tort," C.J. McAuliffe (Student Author), 20 *Environmental Affairs* 265 (1993)

This article addresses the difficulties plaintiffs face in proving causation in toxic tort litigation. The author suggests that actions in battery would overcome this hurdle for plaintiffs because plaintiffs do not have to prove physical injury to satisfy the harmful contact element of a battery cause of action, i.e., the body's contact with certain substances can by itself constitute the injury. The author cites a student law review article about "Smoker Battery" and asserts that the intent element of battery is satisfied where the smoker continues to smoke after being told to stop.

#### [24] U.S. Supreme Court Decision Expected Soon in Case Involving the Admissibility of Scientific Evidence

A decision by the U.S. Supreme Court is expected before the end of June in a products liability case in which the parties have asked the Court to decide the appropriate standard for the admissibility of scientific evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, No. 92-102 (U.S. Supreme Court) (review granted 10/13/92).

The petitioners in the case are two minors born with limb reduction birth defects, who allege that a prescription drug taken by their mothers during pregnancy, Bendectin, caused their birth defects. Bendectin is an anti-nausea medication.

At the trial court level, plaintiffs' causation evidence consisted primarily of expert testimony based upon *in vitro* studies, *in vivo* (animal) studies, chemical structure analysis, and a reanalysis of existing epidemiologic

studies. Defendant offered affidavit testimony to establish that, based upon the available literature of more than 30 published studies involving more than 130,000 patients, no published epidemiologic study demonstrated a statistically-significant association between Bendectin and birth defects.

The district court granted a motion for summary judgment filed by Merrell Dow, holding that plaintiffs must provide statistically-significant epidemiologic evidence of causation in order to meet their burden of proof and that an unpublished reanalysis offered by one of plaintiffs' experts was inadmissible. The U.S. Court of Appeals for the Ninth Circuit affirmed, stating that the reanalysis did not meet the requirements of general acceptance in the scientific community.

To the Supreme Court, petitioners argued that the Federal Rules of Evidence eliminate any type of "general acceptance test" for excluding scientific evidence. Respondent Merrell Dow contended that the Federal Rules of Evidence require the specific testimony of each expert witness to have an adequate foundation, judged by the accepted standards of the expert's field. Briefing is complete, and oral argument was held on March 30, 1993.

One of the *amici curiae* who filed a brief supporting the pharmaceutical company was Alvan Feinstein, professor of medicine and epidemiology at Yale University and the author of "Justice, Science and the 'Bad Guys,'" an editorial about ETS and science. In his brief, Dr. Feinstein argued that significance testing and confidence intervals are necessary tools for evaluating the stability of the numbers being examined in epidemiologic data. He stated: "I can think of no better way to allow 'junk science' into the courtroom than to remove the constraints that demand numerical stability for data. If researchers can choose confidence intervals in an *ad hoc* manner, without justifying their selection of appropriate boundary values according to accepted scientific standards, the result will be confidence games, not confidence intervals." Professor Feinstein also stated that reanalysis of epidemiological data may be an acceptable scientific method if subjected to established scientific standards and the rigors of peer review.

## OTHER DEVELOPMENTS

### [25] Polls in Virginia and Kentucky Cover Workplace Smoking Issues

According to a survey conducted by Mason-Dixon Political-Media Research Inc., 66 percent of Virginians favor laws banning smoking in indoor places. Sixty-one percent also favored laws protecting the rights of smokers, requiring employers to provide smoking areas for employees and barring discrimination against employees who smoke. See *Washington Times*, May 10, 1993.

According to a poll of 801 adults conducted by a newspaper in Kentucky, 50 percent said smoking should be banned at indoor workplaces. Some 22 percent of respondents reportedly stated that there were no smoking restrictions in their places of employment, down from 33 percent in 1990. According to the survey, attitudes about smoking prohibitions did not vary between tobacco-growing counties and other counties. See *The Courier-Journal*, April 25, 1993.

### [26] Restaurants Study Ban on Smoking

A number of restaurant operators in Spokane are considering joining together to ban smoking in their establishments. Consideration of a ban is due in part to recent reports of the alleged effects of exposure to ETS. Vocal nonsmokers are also a motivating force. The restaurant's employees reportedly have conducted surveys and found that most customers would not be bothered by a smoking ban. See *Journal of Business-Spokane*, April 15, 1993.

### [27] Insurance Industry Views IAQ Complaints as Psychosocial Phenomenon

At a recent meeting of an insurance industry trade association, a risk manager from Oregon reportedly told employers that workers' compensation is a "failed social policy that does more harm than good." The risk manager blamed the media for creating illnesses that do not really exist and declared that the issue of indoor air quality "has been put to bed as largely a psychosocial phenomenon." He added that employers should get tough with employees who are out sick and that workers too often blame the workplace for illnesses they would have had anyway. See *National Under-*

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writer, *Property & Casualty/Risk & Benefits Management Edition*, May 3, 1993.

**[28] Doctor Who Bans Smoking Turns Away Patients Who Smoke**

Dr. Mark Jameson of Hagerstown, Maryland, reportedly opened his private practice in March and not only banned smoking in his office, but decided to limit his practice to nonsmokers. Jameson, who is a former director of health services for the Washington County Health Department, apparently believes that he has no duty to take care of patients who are suffering from "their deliberate act." See *Associated Press*, May 13, 1993.

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**MEDIA COVERAGE**

**[29] "Carpet Industry Facing Toxic Concerns: at Least 500 People Say New Carpeting Has Made Them Sick," J. Fried, *The Philadelphia Inquirer*, May 9, 1993**

This article highlights current developments in the controversy over the alleged health effects of new carpeting. Recent events mentioned in the article include the release of the results of Anderson Laboratories mice experiments, the EPA's decision to investigate carpet emissions, and the filing of a lawsuit in Philadelphia against three major carpet makers. The article asserts that at least 500 people have complained to the Consumer Product Safety Commission that new wall-to-wall carpeting has made them sick.

**[30] "Smoking Shifts to Front Burner of Property Issues," T.J. Howard, *The Chicago Tribune*, May 16, 1993**

This article examines how the public pressure for stricter smoking policies affects building owners and operators in the Chicago area, who must try to keep both tenants and employees happy.

According to the article, 52 office buildings inside the Chicago Loop, or about 20 percent of the total, prohibit smoking entirely. Another 112 buildings, or 42 percent, prohibit smoking in the lobbies and corridors.

The owners and operators say their decisions about smoking policies are influenced by BOMA's recommendation of a ban on smoking in the workplace, the EPA Risk Assessment on ETS, and the perceived threats of lawsuits by persons alleging injury from ETS exposure.

As employers curtail smoking, the article states, building owners and managers are often charged with policing the issue and providing alternatives for smokers, such as outside smoking areas or separately-ventilated lounges. A relatively new alternative discussed in the article is a smoking trailer. The Williams Scotsman Group, a Baltimore-based manufacturer of portable office space, plans to market designated smoking facilities — trailers with enhanced ventilation systems.

**[31] "Workplace Issues: Smoking in the Workplace," *Fair Employment Practices Guidelines* (April 25, 1993)**

This article discusses a number of workplace smoking issues including the alleged costs to employers of employing smokers, the respective rights that both smokers and nonsmokers may have under the Americans with Disabilities Act, discrimination against smokers in hiring practices, and adoption of workplace smoking policies. The article includes a summary of the EPA Risk Assessment on ETS and discusses the ways in which some states are responding to the risk assessment.

**[32] "Les Miserable . . . The Wretched, the Doomed, the Hard-core Smokers," J. Adams, *The Courier-Journal*, April 25, 1993**

This article presents, in a playscript format, information about smoking policies that are being adopted by Louisville, Kentucky, businesses and the effect those policies are having upon smokers who are being forced to smoke out of doors. The writer has one of the characters observe that he or she "can't stand the smoke even on the sidewalks" and that perhaps smoking should be banned everywhere except on a particular bridge.

## SCIENTIFIC/TECHNICAL ITEMS

### UPCOMING MEETINGS

- [33] "Twenty-sixth Annual Meeting for the Society for Epidemiologic Research (SER)," Keystone, Colorado, June 16-18, 1993

According to the preliminary program, this meeting will include presentations entitled "Influence of Maternal Smoking, Paternal Smoking, and Involuntary Maternal Smoking Exposures on Oral Cleft Defects," by G.M. Shaw; "Previous Reproductive Cancer as a Risk Factor for Lung Cancer in Lifetime Nonsmoking Women," by G. Kalsat; "Dietary B-Carotene and Lung Cancer Risk in Nonsmokers," by S.T. Mayne; "A Case-control Study of Childhood and Adolescent Household Passive Smoking and the Risk of Female Lung Cancer," by F. Wang; and "Effects of Maternal Smoking and Childhood Respiratory Illness on Pulmonary Function in Young Adults: the CARDIA Study," by J. Dunn. One symposium will include three papers on meta-analysis.

- [34] "Third International Conference on Preventive Cardiology," Oslo, Norway, June 27-July 1, 1993

According to the program for this conference, it will include an entire session on ETS and cardiovascular disease. Lars Wilhelmsen will present "Is There a Threshold Value?"; Robert Beaglehole will present "Updating Epidemiological Evidence"; Stanton Glantz will present "Updating Experimental Evidence"; and Richard Peto will present "How Many Victims?"

### RESPIRATORY DISEASE AND CONDITIONS — ADULTS

- [35] "Long-Term Ambient Concentrations of Total Suspended Particulates, Ozone, and Sulfur Dioxide and Respiratory Symptoms in a Nonsmoking Population," D.E. Abbey, F. Petersen, P.K. Mills, and W.L. Beeson, *Archives of Environmental Health* 48(1): 33-46, 1993 [See Appendix A]

This study discusses long-term follow-up of a non-smoking cohort of Seventh-Day Adventists in Califor-

nia. ETS is not mentioned. The authors report statistically significant increased risks of certain respiratory conditions associated with outdoor air pollutant levels.

### RESPIRATORY DISEASES AND CONDITIONS — CHILDREN

- [36] "Childhood Asthma and Indoor Environmental Risk Factors," C. Infante-Rivard, *American Journal of Epidemiology* 137(8): 834-844, 1993 [See Appendix A]

Based on a case-control study of children in Montreal, Canada, this author reports a statistically significant risk of asthma associated with "mother's heavy smoking." A number of potential risk factors for asthma were also identified.

- [37] "Indoor Nitrogen Dioxide and Childhood Respiratory Illness," L.S. Pilotto and R.M. Douglas, *Australian Journal of Public Health* 16(3): 245-250, 1992 [See Appendix A]

In this review article, the authors discuss epidemiologic data on nitrogen dioxide, which they describe as an emission from gas-fired appliances and a component of tobacco smoke, and childhood respiratory illness. They conclude that additional research is needed to "determine if there is a health risk" associated with exposure to nitrogen dioxide.

- [38] "The Relationship of RSV-Specific Immunoglobulin E Antibody Responses in Infancy, Recurrent Wheezing, and Pulmonary Function at Age 7-8 Years," R.C. Welliver and L. Duffy, *Pediatric Pulmonology* 15: 19-27, 1993 [See Appendix A]

Respiratory syncytial virus (RSV) has been related to childhood respiratory infections. In this paper, the authors investigate pulmonary function in children who had had bronchiolitis attributable to RSV. They conclude that "passive smoking" may be more important in determining the outcome of bronchiolitis than the severity of the RSV infection itself.

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## OTHER HEALTH ISSUES

- [39] "Protracted Secretory Otitis Media. The Impact of Familial Factors and Day-Care Center Attendance," F. Rasmussen, *International Journal of Pediatric Otorhinolaryngology*, 26: 29-37, 1993 [See Appendix A]

This article reports on a Swedish cohort study assessing possible risk factors for otitis media (requiring tympanotomy tube insertion). The authors suggests that attendance at a day-care center or having a sibling with the condition were associated with an increased risk of otitis media. Parental smoking was reportedly not associated with the incidence of otitis media.

## INDOOR AIR QUALITY

- [40] "Measurement of Cabin Air Quality Aboard Commercial Airliners," N.L. Nagda, M.D. Koontz, A.G. Konheim, and S.K. Hammond, *Atmospheric Environment* 26A(12): 2203-2210, 1992 [See Appendix A]

This study reports data on levels of ETS and other substances in airliners, collected as part of the 1989 Department of Transportation study on airliner cabin air quality. The authors suggest that ETS "migrated" into nonsmoking areas, and report that CO<sub>2</sub> and humidity could "pose potential comfort problems" for occupants.

- [41] "Effects of Ventilation on Smoking Lounge Air Quality," P.R. Nelson, R.B. Hege, J.M. Conner, G.B. Oldaker, and H.E. Straub. In: *Measurement of Toxic and Related Air Pollutants*, Proceedings of the 1992 U.S. EPA/A&WMA International Symposium. Pittsburgh, Air & Waste Management Association, 89-94, 1993 [See Appendix A]

Researchers from R.J. Reynolds report on a "test" smoking lounge in which various ventilation configurations were evaluated. Acceptable air quality was reportedly achieved at ventilation rates suggested by ASHRAE.

- [42] "Ventilation and Indoor Air Quality in Finnish Daycare Centers," R. Ruotsalainen, N. Jaakkola, and J.J.K. Jaakkola, *Environment International* 19: 109-119, 1993 [See Appendix A]

This Finnish study presents data collected on ventilation rates, temperature, humidity, indoor air constitu-

ents, and perceptions of indoor air quality. The authors conclude that, in general, indoor air quality in Finnish daycare centers could be improved, citing inadequate ventilation as one of the major problems.

- [43] *Indoor Allergens: Assessing and Controlling Adverse Health Effects*, Committee on the Health Effects of Indoor Allergens, Institute of Medicine, A.M. Pope, R. Patterson, and H. Burge (eds.), Washington, National Academy Press, 1993

"Indoor allergens constitute a substantial public health problem," according to this recently-released report. Moreover, "[t]he economic and social impacts of allergic disease in the United States are significant," and include absenteeism from work and school.

The Institute of Medicine prepared this "assessment of the public health significance of indoor allergens" in response to a request from "several agencies of the federal government." Identified sponsoring agencies were EPA; the National Institute on Allergy and Infectious Disease; the National Heart, Lung, and Blood Institute; the National Institute of Environmental Health Sciences; and the Agency for Toxic Substances and Disease Registry. The committee that prepared the report included engineers, aerobiologists, epidemiologists, psychologists and physicians.

The primary objectives of the study were "to identify airborne biological and chemical agents found indoors that can be directly linked to allergic diseases," "to assess the health impacts of these allergens," and "to determine the adequacy of the knowledge base that is currently available on this topic." The report includes a summary of available data, a list of consensus recommendations designed to improve awareness and education, and a research agenda describing long-term research needs.

Using currently available data, the committee estimates that "one out of five Americans will experience allergy-related illness at some point during their lives and that indoor allergens will be responsible for a significant share of these cases." They estimate that 50 million Americans experience hay fever and other allergic diseases, and that 20-30 million have asthma. Related to the latter estimate, the report indicates that the estimated cost of illness related to asthma was \$6.2 billion in 1990.



The committee lists the following "major sources" of indoor allergens: house dust mites, fungi and other microorganisms, domestic pets (cats and dogs), cockroaches, and "reactive allergenic chemicals" contained in some household products. ETS is discussed in the committee's description of the process of developing allergic disease. While some persons have claimed to experience "tobacco smoke allergy," the committee classes ETS among "nonallergenic agents." Nevertheless, they suggest that nonallergens can interact with allergens in the development of sensitization in an individual. In particular, the report states: "Exposure to nonallergens that irritate the respiratory tract (e.g., environmental tobacco smoke) can promote the development of allergic reactions and disease."

With regard to control of allergen-caused disease, the committee advocates avoidance of exposure. They state: "The reduction and/or elimination of human exposure is probably best achieved by simultaneously controlling allergen sources and improving building ventilation, i.e., the design, operation, and maintenance of heating, ventilation, and air-conditioning (HVAC) systems."

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## IN EUROPE & AROUND THE WORLD

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### REGULATORY AND LEGISLATIVE MATTERS

#### AUSTRALIA

##### [44] Rebel MPs Stall Plan to Implement Parliament Smoking Restrictions

According to a press report, plans to impose a partial smoking ban in the New South Wales Parliament have been set back six months following stiff opposition from "rebel" MPs. The restrictions will now go into effect on January 1, 1994. See *Daily Telegraph Mirror*, May 19, 1993.

In a related story, control of the New South Wales Parliament was apparently taken from its two presiding officers and given to a new MP-run committee in the wake of contention over issues such as smoking. See *Sydney Morning Herald*, May 17, 1993.

Meanwhile, MPs in South Australia are apparently defying a ban on smoking that was imposed in Parliament offices during its last session. See *Adelaide Advertiser*, May 12, 1993.

#### AUSTRIA

##### [45] Coalition Reaches Compromise on Tobacco Law

According to a press report, the parties of Austria's ruling coalition have reached a compromise on a new tobacco law. Among other matters, there will apparently be no provision in the measure imposing the originally-planned smoking ban in official buildings, schools, universities and on public transport. See *Der Standard*, May 14, 1993.

#### CANADA

##### [46] Smoking Restrictions Considered in East York

The East York Council was reportedly scheduled to consider a smoking restriction by-law at its May 17 meeting. Some three years of community consultation apparently preceded development of the by-law which would require the designation of smoking areas or the creation of completely smoke-free environments in all East York workplaces. The measure, if adopted, will go into effect on May 31, World No-Tobacco Day. Workplaces and public places will reportedly have one year to make the transition. See *Canada NewsWire*, May 13, 1993.

##### [47] Scarborough Approves in Principle Total Smoking Ban

According to a press report, Scarborough has become the first municipality in Canada to call for a total smoking ban in all enclosed public places including bars, restaurants, pool halls, bingo parlors and meeting places. Council reportedly voted to approve the ban in principle, but it will not go into effect until a bylaw laying out the terms is approved by Queen's Park later this year. The mayor urged Council to approve the policy and reportedly said it would be good for the city's image. Opposition to the policy reportedly came from representatives of bingo halls who said it would put them out of business. See *The Toronto Star*, May 20, 1993.

## SWEDEN

**[48] Debate Over Health Effects of ETS Heats Up**

On the eve of the May 27, 1993, parliamentary vote on the New Tobacco Act, the press reported findings from the United States that traces of nicotine were found in 99 percent of 5,000 individuals tested by the Centers for Disease Control and Prevention (CDC). Apparently, *Svenska Dagbladet* was the first newspaper to have seen preliminary results at this stage of the CDC study, which will eventually analyze blood tests from 23,000 people.

Head of the study, Dr. James Pirkle, evidently admitted that cotinine traces originating from foods such as instant tea could have been picked up by the sensitive instruments that are being used to analyze blood samples. "Traces are very small in these foods, and diet could very well be an insignificant factor," he said, "but we must make sure that there are no question marks whatsoever hanging over this survey."

The press also reported the findings of the EPA Risk Assessment on ETS. According to Margaretha Haglund of the Medical Research Council, the CDC survey and the EPA report demonstrate that "passive smoking is much more widespread than we had thought" and that "passive smoking produces much the same damage as active smoking." See *Svenska Dagbladet*, May 1993.

It is unknown what impact this information will have on the vote in Parliament. The New Tobacco Act would not require the imposition of total smoking bans in public places or restaurants and would permit employees and their employers to develop mutually agreeable smoking policies. See issue 45 of this Report, April 16, 1993.

## KINGDOM OF TONGA

**[49] Government Considers Smoking Ban**

The King and Legislative Assembly are considering legislation that would ban smoking in enclosed public places, government buildings, workplaces, shopping centers, restaurants and on public transport. Also being considered are cigarette package warnings that would change every six months and that would include the statements "Protect children: don't make them breathe

your smoke" and "Smoking damages the health of those around you."

## UNITED KINGDOM

**[50] Southend Debates Smoking Policy**

Proposals to ban smoking in various authority-run buildings in Southend were reportedly defeated after heated debate. Supporters of the measure cited the 1974 Health and Safety Act which purportedly imposes a duty upon the council for the health and safety of its employees. Opponents apparently resisted the proposals by arguing that Council should not be dictating to others about the issue. See *Southend Evening Echo*, April 28, 1993.

**[51] Barrow Councillors Disobey Ban They Adopted**

According to a press report, the personnel committee in Barrow was told that the only individuals breaking the ban on smoking that was adopted in March are the councillors who voted to adopt it. A representative of FOREST is quoted as saying, "It is what you would expect from these sort of people — on the one hand they behave like prudish health fascists and on the other hand they ignore the rules anyway." See *North Western Evening Mail*, April 16, 1993.

**[52] Health Board Adopts Smoking Restrictions**

The Borders Health Board has reportedly approved a policy that will restrict smoking by employees to designated breaks in special areas. Visitors and contractors will not be permitted to smoke in any health board premises, but patients can continue to smoke if they are long-term residents or if they are short-term patients who are unable to stop smoking. Staff will have discretion to permit smoking by those patients and relatives who find themselves in "very stressful situations." The policy will apparently be implemented in stages, and employees will have until October 31, 1993, to adjust to the restrictions. See *Berkwickshire News*, April 15, 1993.

**[53] Antismoking Campaign for Children Launched**

Health chiefs in Gloucestershire have reportedly backed a campaign created by the Royal College of Physicians which, among other matters, says children